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Nos. 14-556, 14-562, 14-571, 14-574 & 14-596

IN THE

Supreme Court of the United States

APRIL DEBOER, *et al.*,
Petitioners

v.

RICHARD SNYDER, *et al.*,
Respondents

Additional Case Captions Listed On Inside Front Cover

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

BRIEF OF *AMICUS CURIAE* IDAHO GOVERNOR C.L. "BUTCH" OTTER

THOMAS C. PERRY
COUNSEL TO THE GOVERNOR
P.O. Box 83720
Boise, Idaho 83720-0034

GENE C. SCHAERR
Counsel of Record
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

VALERIA TANCO, *et al.*,

Petitioners

v.

WILLIAMM EDWARD "BILL" HASLAM, *et al.*,

Respondents

BRITTANI HENRY, *et al.*,

Petitioners

v.

RICHARD HODGES,

Respondent

JAMES OBERGEFELL, *et al.*,

Petitioners

v.

RICHARD HODGES

Respondent

TIMOTHY LOVE, *et al.* AND GREGORY BOURKE, *et al.*,

Petitioners

v.

STEVE BESHEAR

Respondent

JONATHAN P. ROBICHEAUX, *et al.*,

Petitioners

v.

DEVIN GEORGE, *et al.*,

Respondents

QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution requires a state to define or legally recognize marriages as between people of the same gender.

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INTRODUCTION AND INTERESTS OF *AMICUS*[1]

If this Court is prepared to decide the constitutionality of state man-woman marriage laws—as *amicus* believes it should—it is important that the Court have before it at least one case in which state officials will vigorously defend those laws on the merits. Unless state representatives in one case are mounting such a defense—including an explanation of why the man-woman definition of marriage satisfies any form of heightened scrutiny—neither the Court nor the public can be assured that the ultimate decision will be the product of a fair contest between opponents who made the strongest possible arguments on both sides.

Although the officials in the cases now before the Court have been well represented, none has demonstrated a willingness to mount such a defense. Perhaps they believe this Court will inevitably reject all the arguments for heightened scrutiny, thus making a defense under such a standard superfluous. Or perhaps some fear (incorrectly) that a vigorous defense will impugn the parenting skills of same-sex couples and thus be offensive to gays and lesbians. Whatever the reason, these officials' presentations have left an important viewpoint unrepresented, and it is one that needs to be vigorously presented in this Court.

That is a main reason Governor Otter respectfully suggests that the Court ensure that the Idaho case,

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[1] Undersigned counsel have authored this brief in whole, and no other person or entity has funded its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2 of amicus' intent to file this brief, and all parties have consented to its filing in communications on file with the Clerk.

Otter v. *Latta*, 771 F.3d 456 (9th Cir. 2014)—in which the Governor is a named party—is among the cases the Court uses as "vehicles" for deciding the constitutionality of the man-woman definition. Unlike the laws now before the Court, Idaho's definition has been vigorously defended, in part on the ground that it satisfies the heightened scrutiny that the Ninth Circuit held applies to such laws. And unlike those cases, the Ninth Circuit in *Latta* purported to address Idaho's heightened-scrutiny defense. Moreover, *Latta* will likely be before the Court in a very few days: Unless the Ninth Circuit quickly grants the pending petition for rehearing en banc, *amicus* intends to seek this Court's review by January 5, 2015.

Latta is an ideal vehicle for other reasons too. First, as with the Second Circuit's decision that this Court reviewed in *Windsor* v. *United States*, 133 S. Ct. 2675 (2013), *Latta* is the only pending case in which a court of appeals has held that classifications based on sexual orientation are subject to heightened scrutiny. Given the likely importance of that issue to the constitutionality of the man-woman definition, it makes sense to ensure that at least one of the cases before this Court is one in which the court of appeals articulated and relied upon the suspect class argument.

Next, *Latta* is the only pending case in which participating state officials (including the Nevada officials in the consolidated case) defended the man-woman definition on the ground that redefining marriage would lead to a substantial risk of intrusion into citizens' religious freedom. And here again, the Ninth Circuit addressed that point in its decision. Slip Op. at 29-30. Given the likely importance of this issue to

the Court's ultimate resolution, it makes sense to include *Latta* among the cases in which this Court grants review.

In addition, unlike some of the pending cases, *Latta* offers an opportunity to review state laws that define marriage as only between a man and a woman *and* that recognize only those marriages from other states. See Slip Op. at 32. It will be more efficient for the Court to resolve the constitutional issue presented here in a case that involves both the "licensing" and "recognition" contexts. And finally, the advocates on both sides of *Latta* are experienced and capable.

For all these reasons, Governor Otter respectfully suggests that the Court (a) wait until it has *Latta* before it before deciding which petition(s) to use as a vehicle for resolving the constitutionality of the man-woman definition of marriage, and at that time, (b) grant the *Latta* petition in addition to whichever of the currently pending petitions the Court views as the best vehicle.

ARGUMENT

Latta should be considered on the merits along with whichever of the currently pending cases this Court believes will provide the best vehicle for deciding the constitutionality of man-woman marriage laws.

Although *Latta* is currently pending before the Ninth Circuit on a petition for rehearing en banc—which was filed before the Sixth Circuit decision now before this Court—*Latta* remains the most appropriate vehicle for resolution of the constitutionality of man-woman marriage laws. That is why, unless the Ninth Circuit grants rehearing en banc within the next few days, *amicus* will seek review in this Court on January 5, 2015.[2] For five reasons, moreover, it makes sense for the Court to wait until it has *Latta* before it before deciding which case(s) will best assist the Court in resolving that fundamental issue as well as subsidiary questions such as whether sexual orientation constitutes a suspect class.

A. *Latta* is the only pending case in which state officials have vigorously defended the man-woman definition, explaining why it satisfies any form of heightened scrutiny.

First, as noted, *Latta* is the only case pending in the courts of appeals in which public officials have vigorously defended the man-woman definition of marriage—including an explanation of why that definition

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[2] Governor Otter is also working with the Idaho Attorney General to file a single joint petition on that date. The Attorney General's petition is currently due on January 5.

satisfies heightened scrutiny.[3] Such a defense appropriately begins less than twenty years after the ratification of the Fourteenth Amendment, when this Court embraced a model of marriage that at the time seemed obvious: "[N]o legislation," the Court held, "can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman in the [] estate of matrimony...*" *Murphy v. Ramsey,* 114 U.S. 15, 45 (1885) (emphasis added). To be sure, the Court has recently held that the States are free to depart from that model of marriage—and hence from the Court's own view of the compelling government interests that underlie it. *See United States v. Windsor,* 133 S. Ct. 2675, 2693-94 (2013). But the Court has been equally emphatic that the *States* retain the "historic and essential authority to define the marital relation," in part because that authority is "the foundation of the State's broader authority to regulate the subject of domestic relations ... " *Id.* at 2692, 2691.

1. As was repeatedly explained to the district court and the panel, marriage is a complex social institution that pre-exists the law, but which is supported by it in virtually all human societies. *Otter* v. *Latta* Gov. Otter Opening Brief ("OB") at 10-11 (citing among others ER 1107-08). And a principal purpose of marriage in virtually all societies is to ensure, or at least increase the likelihood, that all children have a known mother

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[3] The analysis presented in this section is presented in greater detail, and with more supporting citations, in another amicus brief filed contemporaneously with this one. See Brief of *Amici Curiae* Scholars of Marriage.

and father with responsibility for caring for them. OB at 9-10. Indeed, Bertrand Russell—no friend of traditional sexual mores—once remarked, "But for children, there would be no need of any institution concerned with sex." Memo in Support of Summary Judgment, 13-482-CWD, Dkt No. 57-2, at 35 (D. Idaho Feb. 18, 2014).

As was also explained to the district court and the panel, the man-woman definition is integral not only to the social institution of marriage that Idaho's marriage laws are intended to support, but also to Idaho's *purposes* in providing that support—which it does at considerable cost. Throughout its history, Idaho has rejected what Justice Alito has aptly called (without any disagreement from other Justices) the relatively but decidedly adult-centric, "consent-based" view of marriage, and has embraced instead the more child-centric, "conjugal" view. See *Windsor,* 133 S. Ct. at 2718 (Alito, J., dissenting); see also OB at 12. And Idaho has repeatedly implemented that view of marriage by explicitly retaining the man-woman definition despite decisions by other states to redefine marriage as the union of any two otherwise qualified "persons."[4]

By itself, the man-woman definition conveys that marriage—as understood in Idaho—is centered on children, which man-woman pairings are uniquely capable of producing. OB at 18-19, 26. That definition also conveys that one of marriage's purposes is to provide a structure by which to care for any children that may be created accidentally—an issue that, again, is

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[4] *E.g.,* Marriage Equality Act (NY), AB A08354 (June 24, 2011); Civil Marriage Protection Act (MD), House Bill 438 (March 1, 2012).

unique to man-woman couples. *Id.* at 27, 31-35. Moreover, by requiring a man and a woman, that definition indicates that this structure will ideally have both a "masculine" and a "feminine" aspect.

By implicitly referencing children, accidental procreation, masculinity and femininity, the man-woman definition also "teaches" or reinforces certain child-centered "norms" or expectations. OB at 26, 32-35. Because only man-woman couples are capable of producing children together through bodily union, these norms are directed principally at opposite-sex couples, and include the following (among others):

1. Where possible, every child has a right to be supported financially and emotionally by the man and woman who brought her into the world (the "maintenance" norm). *See* OB at 31.

2. Where possible, every child has a right to be reared by and to bond with her own biological father and mother (the "bonding" norm). OB at 27, 30-32, 35 n.23 (citing ER 112-53); 36-39; ER 750.

3. Where possible, a child should be raised by *a* mother and father, even where she cannot be raised by both her biological parents (the "gender-diversity" norm). OB at 27-28, 35; ER 735. (This norm does not directly speak to parenting by gays and lesbians, who may not realistically have the option of raising their children with the other biological parent.)

4. In all their decisions, parents should put the

long-term interests of their children ahead of their own personal interests (the "child-centricity" norm). OB at 43-47.

The evidence presented below also established that Idaho and its citizens receive enormous benefits when man-woman couples heed these norms associated with the conjugal vision and definition of marriage. Common sense and a wealth of social-science data teach that children do best emotionally, socially, intellectually and economically when reared in an intact home by both biological parents. OB at 27, ER 533. Such arrangements benefit children of opposite-sex couples both by harnessing the biological connections that parents and children naturally feel for each other, and by providing what experts have called "gender complementarity" in parenting. OB at 27-28, ER 712, ER 735. Compared with children of man-woman couples raised in any other environment, children raised by their two biological parents in a married family are less likely to commit crimes, engage in substance abuse, and suffer from mental illness, and more likely to support themselves and their own children successfully in the future. OB at 29 n. 15, 30. Accordingly, such children pose a lower risk of needing State assistance, and a higher long-term likelihood of contributing to the State's economic and tax base.

Similarly, parents who follow the norms of child-centricity, bonding and maintenance are less likely to engage in the kinds of behaviors—such as child abuse or neglect, or divorce—that typically require State assistance or intervention. OB at 28, 39. And again, each of these norms is closely associated with—and reinforced by—the man-woman definition of marriage.

2. It is thus easy to see why so many informed commentators on both sides have predicted that redefining marriage to accommodate same-sex couples—which requires removing the man-woman definition—will change the institution profoundly. Writing not long ago, Judge Posner described same-sex marriage as "a radical social policy." Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide? 95 Mich. L. Rev. 1578, 1584 (1997). And in more measured terms, Oxford's prominent liberal legal philosopher Joseph Raz observed that "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous ... marriage." Gov. Otter's Response Brief, 13-482-CWD, Dkt No. 81, at 9 n. 18.

For opposite-sex couples, as was repeatedly explained below, the major effect of that "transformation" will be the erosion or elimination of each norm that depends upon or is reinforced by the man-woman definition. For example, as Professors Hawkins and Carroll have explained, the redefinition puts in place a legal structure in which two women (or two men) can easily raise children together as a married couple, and thus places the law's authoritative stamp of approval on such child-rearing arrangements. And for heterosexual men—who generally need more encouragement than women to marry and parent—that legal change suggests that society no longer needs men to form well-functioning families or to raise happy, well-adjusted children. OB at 38-39; ER 122; Gov. Otter Reply Brief, Dkt No. 157, at 8; *see generally* Steven L. Nock, *Marriage in Men's Lives* (1998).

For similar reasons, such a redefinition teaches heterosexuals that society no longer places as much

value on biological connections and gender diversity in parenting. *Id.* And a redefinition weakens the expectation that biological parents will take financial responsibility for any children they participate in creating (since sperm donors and surrogate moms aren't expected to do that), and that parents will put their children's interests ahead of their own (since the redefinition is being driven largely by a desire to accommodate the interests of adults).

Furthermore, just as those norms benefit the State and society, their removal or dilution can be expected to harm the interests of the State and its citizens. For example, as fewer heterosexual parents embrace the norms of biological connection, gender complementarity and maintenance, more children will be raised without a mother or a father—usually a father. That in turn will mean more children raised in poverty, experiencing psychological or emotional problems, and committing crimes—all at significant cost to the State. OB at 28-29. Similarly, as fewer parents embrace the norm of child-centricity, more will make choices driven by personal interests rather than the interests of their children. Many of these choices will likewise impose substantial costs on the State. OB at 33-34.

3. To its credit, the *Latta* panel devoted some fifteen pages in attempting to rebut some of these points. But the panel simply ignored the principal point, which is that redefining marriage in genderless terms will change the *social institution* of marriage in a way that risks adversely affecting the behavior of *heterosexuals*—whether or not they choose to get (and stay) "married" under the new genderless-marriage regime. The panel thus did not deny that the specific norms discussed above are part of the marriage institution as

it always has and currently exists in Idaho, that Idaho has a compelling interest in maintaining those norms among heterosexuals, or that a redefinition will likely weaken or destroy those norms for that population. Instead, the panel engaged in two main diversions.

First, the panel said (Slip Op. at 15-16) that the State's defense of the man-woman definition is based on the idea that "allowing same-sex *marriages* will adversely affect opposite-sex marriage ...." (emphasis added). But it's not the *existence* of same-sex marriages that is of principal concern. It's the *redefinition* of marriage that such marriages requires—i.e., replacing the man-woman definition with an "any qualified persons" definition—and the resulting impact of that redefinition on the *institution* of marriage, especially as perceived and understood by opposite-sex couples.

Similarly, in addressing the possibility that same-sex marriage will reduce the desire of heterosexual males to marry, the panel summarily dismissed as "crass and callous" the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child ... to have a father, it is also unnecessary for *his* child to have a father." Slip Op. at 19 (emphasis added). But according to evidence submitted in the district court and to the panel, *see* ER 112-53, it's not the fact that the father "will *see* a child being raised by two [married] women" that is likely to reduce his enthusiasm for marriage. It's the fact that marriage will have already been redefined—legally and institutionally—in a way that makes his involvement seem less important and valuable than before. *See, e.g., Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (noting important role of law as a

teacher). And although not all heterosexual fathers or potential fathers will have less interest in marriage as a result of that change, *some* of them—especially those at the margins of commitment to marriage and fatherhood—will undoubtedly do so.

Second, on several points the panel rejected the institutional defense because, in its view, it "is, fundamentally, ... about the suitability of same-sex couples, married or not, as parents, adoptive or otherwise." Slip Op. at 27. Not so. While some aspects of that defense might have some conceivable bearing on policies toward parenting by gay and lesbian citizens, the point here is different: It's about the impact of removing the man-woman definition on the marriage institution—i.e., the public meaning of marriage—and the impact of that change on heterosexuals. The panel had no answer to the reality that replacing that definition with an "any qualified persons" definition will (a) weaken or eliminate the norms of biologically connected and gender-diverse parenting (and other norms) that are currently part of Idaho's definition and vision of marriage, and (b) lead at least some heterosexual parents to place less value on those norms when making personal decisions about the upbringing of *their* children—and thus lead to more of *their* children being raised by a single parent.

4. In response to the social risks that would result from removing the man-woman definition (and social understanding) of marriage, the panel cited a single study suggesting that Massachusetts' decision to adopt same-sex marriage in 2004 had no *immediate* impact on marriage or divorce rates in that state. Slip Op. at 18. But the conclusions of that study have been hotly disputed, and indeed the evidence clearly shows

a longer-term *increase* in divorce in the wake of Massachusetts' decision—and a *decrease* in marriage rates.[5] Furthermore, a recent study of the Netherlands, which had same-sex marriage before Massachusetts, shows a clear decline in marriage rates among man-woman couples in urban areas after the passage of same-sex marriage laws.[6]

More important, as discussed by Justice Alito in *Windsor*, any empirical analysis of the effects of redefining marriage calls for "[judicial] caution and humility." 133 S. Ct. at 2715. Same-sex marriage is still far too new—and the institution of marriage too complex—for a redefinition's full impact to have registered in a measurable way. *Id.* at 2715-16. Accordingly, as Justice Kennedy pointed out during oral argument in *Perry*, redefining marriage is akin to jumping off a cliff—it is impossible to see with complete accuracy all the dangers one might encounter when one arrives at

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[5] *See* Centers for Disease Control and Prevention, "Divorce Rates by State," (available at http://www cdc.gov/nchs/data/dvs/divorce_ rates_90_95_99-11.pdf) (divorce rates in Massachusetts increased 8% from 2003 to 2011, and were the highest in 2011—the last year of available data—in twenty years); Centers for Disease Control and Prevention, "Marriage Rates by State," (available at http://www.cdc.gov/ nchs/data/dvs/marriage rates_90_95_99-11.pdf) (marriage rates in Massachusetts were lower in 2011—the last year of available data—than in 2003—the year before same-sex marriage started, and were the lowest in over twenty years).

[6] *See* Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands* at 28-29 (2009) (available at http://www.iza.org/conference files/TAM2010/trandafir m6039.pdf).

the bottom. *See* Oral Argument at 47:19-24, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2012) (No. 12-144).

5. Given the foregoing analysis of the benefits conferred on Idaho and its citizens by the man-woman definition, and the harms—or at least risks—the State and its citizens would face by eliminating that definition, Idaho's decision to retain it passes muster under any standard, including strict scrutiny. There can be no doubt that the man-woman definition substantially advances compelling interests—including Idaho's overall interest in the welfare of the vast majority of its children, that is, those of opposite-sex couples. That is not to say that Idaho is unconcerned with same-sex couples or the children they raise together. But the State cannot responsibly ignore the long-term welfare of the many when asked to make a major societal change that will confer a short-term benefit on the few.

The Ninth Circuit responded to the analysis of this point, not by disputing the importance of the State's interests, but by claiming that Idaho is pursuing them in a manner that is "grossly over- and under-inclusive ..." Slip Op. at 23. But that argument is irrelevant for two reasons. First, the panel once again ignored the real issue, which is the impact of redefining marriage on the *institution* itself. Idaho can easily allow infertile couples to marry (and avoid invading their privacy) without having to change the existing man-woman definition of marriage and thus lose the benefits that definition and the associated norms provide. *Cf.* Slip Op. at 24 n. 14. Conversely, taking *other* measures in pursuit of the State interests underlying the man-woman definition—like "rescind[ing] the

right of no-fault divorce, or to divorce altogether" (*id.*)—would not materially reduce the adverse impact on the marriage institution of removing the man-woman definition, or the resulting harm and risks to Idaho and its children. Again, because many of the norms and social benefits associated with marriage flow from that definition, removing it will have adverse consequences no matter what else Idaho might do in an effort to strengthen the institution of marriage.

Second, like the Fourth and Tenth Circuits (which also applied a form of heightened scrutiny), the Ninth Circuit ignored that the choice Idaho faced was binary: Either preserve the man-woman definition and the benefits it provides, or replace it with an "any two qualified persons" definition and risk losing those benefits. Idaho cannot do both. Idaho's choice to preserve the man-woman definition is thus narrowly tailored—indeed, perfectly tailored—to its interest in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime. Under a proper means-ends analysis, therefore, the fact that the State might have done things differently in other, related areas of the law is irrelevant—especially given that neither the panel nor the Plaintiffs dispute that the interests Idaho has articulated are compelling, or that the risks to those interests are real. *See, e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (Kennedy, J., plurality opinion).

6. As previously noted, of all the pending court of appeals cases, *Latta* is the only one in which public officials presented a robust "institutional" defense of the man-woman definition of marriage. And *Latta* is the

only case in which public officials explained why that definition easily satisfies any form of heightened scrutiny. For those reasons, *Latta* is an ideal vehicle for this Court's resolution of the constitutionality of that definition.

B. *Latta* is the only pending case in which an appellate court has held that sexual orientation is a suspect class, and that the man-woman marriage definition "discriminates" on that basis.

Latta is also unique in that it is the only court of appeals decision in the state marriage law context to conclude that sexual orientation is a suspect or quasi-suspect class. That argument was also made and addressed in each of the cases now pending before the Court, and it will undoubtedly be advanced here if the Court grants review.

1. As Judge O'Scannlain pointed out in his dissent from denial of rehearing in *SmithKline v. Abbott Laboratories,* that decision—which formed the basis for the ruling in *Latta*—created a 10-2 circuit split on the suspect class issue. 759 F.3d 990, 991-92 (2014). Besides cementing that split, the *Latta* panel's decision to apply *SmithKline's* heightened standard to Idaho's marriage laws marks an unprecedented intrusion by the United States into Idaho's "historic and essential authority to define the marital relation." *Windsor*, 133 S. Ct. at 2692. That intrusion stands in substantial tension (to say the least) with the principle of federalism on which *Windsor* directly relied, and which affirms that few matters so firmly belong within State authority as laws determining who is eligible to marry—"an area to which States lay claim by right of

history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

Avoiding damage to federalism is one reason this Court has been especially cautious in endorsing novel claims under the Fourteenth Amendment. *See, e.g., District Attorney's Office v. Osborne*, 557 U.S. 52, 72-74 (2009); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). Yet by applying *SmithKline* in the marriage context, the Ninth Circuit has now imposed heightened scrutiny on an area of law—domestic relations—that was previously governed by rational basis review. Replacing that customary deference with heightened scrutiny not only contravenes federalism but also demeans the "fundamental right" of Idaho voters to decide the definition of marriage for themselves. *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014).

As Judge O'Scannlain pointed out, moreover, *SmithKline's* "unprecedented application of heightened scrutiny" has "significant implications" not only "for the same-sex marriage debate," but also "for other laws that may give rise to distinctions based on sexual orientation." 759 F.3d at 990-91 (emphasis added). For example, the *Latta* panel was only partially correct when it stated that "Nevada law currently prohibits discrimination based on sexual orientation in public accommodations, while Idaho law does not." Slip Op. at 30, n. 17. In fact, at least ten Idaho cities have adopted local ordinances prohibiting discrimination on the basis of sexual orientation and gender identity. When applied to those laws—as it likely will be—the panel's call for heightened scrutiny will lead to far-reaching litigation and additional potential liability in

employment, housing, taxation, inheritance, government benefits and other areas of domestic relations.

2. Even assuming *SmithKline* was correct, the *Latta* panel's rationale for holding that Idaho's laws trigger heightened scrutiny under that decision independently merits this Court's review. Idaho has long maintained that, although its marriage laws have a disparate impact on gays and lesbians, its man-woman definition does not classify or discriminate on the basis of sexual orientation. Indeed, that definition does not even mention sexual orientation, gays, or lesbians. It simply draws a distinction between opposite-sex couples and every other type of relationship. It follows that heterosexuals (who might have tax or financial reasons for such a choice) are *forbidden* from marrying someone of the same sex, while, as Judge Posner has noted, "[t]here is no legal barrier to homosexuals marrying persons of the opposite sex; in this respect there is already perfect formal equality between homosexuals and heterosexuals." Richard A. Posner, *Should There Be Homosexual Marriage?* at 1582.

But in one cursory paragraph, the *Latta* panel swept that point aside. It held instead that, because Idaho's laws "distinguish on their face between opposite-sex *couples* ... and same-sex *couples*," those laws amount to "classifications on the basis of sexual orientation"—and are *ipso facto* subject to *SmithKline's* heightened scrutiny standard. Slip Op. at 13. And that holding enabled the panel to avoid the disparate impact branch of equal protection law, with its requirement that, to contravene the Fourteenth Amendment, a neutral law must have both a discriminatory

effect and a discriminatory purpose.[7] Undoubtedly, the panel was aware that the disparate impact test requiring both of these elements has been reiterated dozens of times by this Court[8] and by every other Circuit. The panel also undoubtedly realized that it would be incredible to find that Idaho's marriage laws, stemming from the 1860s, had anything to do with gays and lesbians, much less were animated by animus or a desire to discriminate against them.

Whatever its purpose, the *Latta* panel's "classification" holding departs from settled law—and in a way that merits review by this Court. Specifically, although the panel *quoted* this Court's admonition that facial discrimination depends on "the explicit terms" of the provision at issue, *International Union, United Auto., Aerospace & Agr. Implement Workers of Am.,*

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[7] *See, e.g., Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (finding that "even if a neutral law has a disproportionately adverse effect upon a [protected class], it is unconstitutional under the Equal Protection Clause *only if* that impact can be traced to a discriminatory purpose.") (emphasis added).

[8] *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("[p]roof of [] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (quoting *Arlington Heights*, 429 U.S. at 264, and finding that "[a] court [undertaking equal protection analysis] must keep in mind the fundamental principle that 'official action will not be held unconstitutional *solely* because it results in a [] disproportionate impact.'") (emphasis added); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001) ("disparate impact ...alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny"); *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527, 537-38 (1982) ("even when a neutral law has a disproportionately adverse effect on a [suspect class], the Fourteenth Amendment is violated only if a discriminatory purpose can be shown").

UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991), the panel's analysis flatly ignores that crucial requirement: Unlike this Court in *United Auto Workers,* nowhere did the panel examine the "explicit terms" of the pertinent Idaho laws to determine whether they actually "classify" on the basis of sexual orientation.

Those laws do not do so. For example, Art. III, Section 28 of the Idaho Constitution simply states that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state"—without saying anything about the sexual orientation of the participants. By contrast, the fetal-protection policy at issue in *United Auto Workers expressly* classified based on the employees' sex, thereby warranting the Court's (unanimous) conclusion that it was indeed a "sex-based classification"—and therefore that the plaintiffs there need not establish a disparate impact *or* a discriminatory purpose. *See* 499 U.S. at 198.

Moreover, the *Latta* panel's approach—treating a distinction between man-woman couples and every other sort of relationship as *ipso facto* discrimination based on sexual orientation—will be problematic in future cases. Indeed, as various states begin to accommodate same-sex couples in their domestic relations and other laws, there may be situations in governments believe they have legitimate reasons, unrelated to sexual orientation, for treating same-sex couples differently from opposite-sex couples. For example, a state might decide to charge lower insurance premiums to an employee married to a same-sex partner (regardless of their sexual orientations) than to an employee married to an opposite-sex partner, given

the reduced risk of accidental pregnancy. Under the panel's analysis, such a policy would constitute a "classification based on sexual orientation," and thus automatically subject to heightened scrutiny—even though the state's purpose is to provide a fair financial *benefit* to same-sex couples.

In short, the panel's broad sexual-orientation holdings are an additional, powerful reason why *Latta* provides an ideal vehicle with which to address the constitutionality of state man-woman marriage laws.

C. *Latta* is the only pending case in which state officials have defended man-woman marriage laws in part as a means of limiting the risk of intrusions into religious liberty.

Another reason *Latta* is an ideal vehicle for resolving the constitutionality of man-woman marriage laws is that it is the only pending cases in which public officials defended such laws based in part on the need to limit the risk of incursions into religious liberty. For example, the courts below were repeatedly told that applying heightened scrutiny to classifications based on sexual orientation would amplify the likelihood of religion-related strife and infringements of religious freedom in a wide variety of foreseeable situations. *See* OB 52-56. As was explained to both the district court and the panel, a state and its officials have a profound interest in minimizing such strife on issues, like marriage, on which the U.S. Constitution does not clearly dictate the outcome. *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (referring to "the State's compelling interest in the maintenance of domestic peace").

Yet, like the *SmithKline* panel, the panel here summarily dismissed these concerns: It remarked that "[w]hether a Catholic hospital must provide the same health care benefits to its employees' same-sex spouses as it does their opposite-sex spouses, and whether a baker is civilly liable for refusing to make a cake for a same-sex wedding, turn on state public accommodation law, federal anti-discrimination law, and the protections of the First Amendment. These questions are not before us." Slip Op. at 30. This invitation to litigate such contentious questions invites serious conflicts with religious liberties. And it misses the critical point that Idaho's decision to retain its definition of marriage is justified, in part, by the legitimate purpose of avoiding conflicts between the State's domestic relations law and the First Amendment's guarantee of religious liberty.

D. Unlike most of the pending cases, *Latta* presents both the "licensing" and "recognition" issues.

Another reason *Latta* is a superior vehicle is that it involves claims brought both by same-sex couples seeking a marriage license in Idaho and a same-sex couple seeking Idaho's recognition of a license issued in another state. See Slip Op. at 32. If this Court ultimately vindicates Idaho's right to retain its marriage definition, the Court will also be in a position to reject the recognition claim.

Accordingly, if the Court grants the upcoming Idaho petition, the Court's resolution of the question presented there can mark the end of the marriage-litigation wave in all respects. By contrast, if this Court does not resolve the necessarily related recognition

question, further litigation and uncertainty are assured.

E. On both sides, *Latta* counsel are experienced in the issues presented and in handling cases in this Court.

Finally, counsel on both sides in *Latta* have a wealth of experience with the issues this Court will face in resolving conclusively the constitutionality of the man-woman definition of marriage. And both sides have counsel with wide experience in handling cases before this Court.

CONCLUSION

For all these reasons, Governor Otter respectfully suggests that, before the Court decides which petition or petitions to use as vehicles for resolving the constitutionality of the man-woman definition of marriage, the Court wait until it has *Latta* before it. The Court should then grant review in *Latta* in addition to whichever of the currently pending petitions the Court views as the most appropriate vehicle.

Respectfully submitted,

THOMAS C. PERRY
COUNSEL TO THE GOVERNOR
P.O. Box 83720
Boise, Idaho 83720-0034

GENE C. SCHAERR
Counsel of Record
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com